e-
f
i-
e

-
s
y
f
y
e

n
n
-
e
e
e

No. 187

FILED
SEP 10 1943
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1943.

THE PEOPLE OF THE STATE OF NEW YORK,
on the Relation of STEPHEN ROGALSKI,
Petitioner,

against

WALTER B. MARTIN, as Warden of Clinton Prison at Dannemora, New York,
Respondent.

REPLY TO RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

STEPHEN ROGALSKI,
Petitioner in Pro. Per.,
Box B, Dannemora, N. Y.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

Cases Cited.

CONSTITUTIONAL PROVISIONS AND STATUTES.

Supreme Court of the United States

October Term, 1943.

THE PEOPLE OF THE STATE OF NEW YORK,
on the Relation of STEPHEN ROGALSKI,
Petitioner,

against

WALTER B. MARTIN, as Warden of Clinton Prison at Dannemora, New York,
Respondent.

REPLY TO RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

May it Please the Court:

Comes now, Stephen Rogalski, the petitioner in the above entitled proceeding, in *propria persona,* and opposes the arguments set forth in the respondent's brief and respectfully asks that the petition herein be granted.

ARGUMENT.

POINT ONE.

The indictment originated from Section 1898-A of the New York Penal Law, the basis upon which statute petitioner was convicted.

In his brief (B., p. 3), opposing the Writ of Certiorari by which petitioner prays to have the order of the Court of Ap-

peals, entered April 22, 1943, reviewed by this Honorable Court, in an appeal from a proceeding upon a Writ of Habeas Corpus, respondent alleges that petitioner is in error in averring that the mittimus under which he is being held is predicated upon a conviction rendered pursuant to Section 1898-A of the Penal Law of the State of New York, and which statute is in direct contravention, violation of and repugnance to the Constitution of the United States (P., p. 2).

In order to determine adequately whether respondent is correct, petitioner respectfully begs this Honorable Court for leave to make a part hereof certain portions of the Record on Appeal had previously in the criminal matter (People v. Rogalski, 256 App. Div. (N. Y.), 995; Aff'd 281 N. Y. 581). Aside from having charged Section 1898-A to the jury verbatim (p. 151, f. 453), the trial court construed the statute to mean that, because of your petitioner's mere presence in the automobile where two revolvers had been found, your petitioner, by virtue of Section 1898-A, *was in possession, conscious possession* (p. 154, f. 462), and that the prosecution was not required to establish actual possession, the body of the crime sought to be proven in the indictment (p. 151, f. 451):

> "Trial Court: We have a statute, Section 1898-A of our Penal Law, which does not require the prosecution to actually prove which one of the men * * * owned or possessed or placed a revolver in the car. When a number of individuals are found in there * * * the statute presumes that all the occupants of that car are in possession illegally * * *."

Counsel for the petitioner urged the trial court to charge on constitutional and common law grounds, as follows (p. 159, ff. 476-7):

> "Mr. Ryan: Now, your Honor, I ask you to charge that since the defendant is presumed to be innocent un-

til proven guilty beyond a reasonable doubt, the jury is bound to commence their consideration of the evidence in this case by presuming that the guns were not in the possession of the defendant Rogalski, but in the possession of one of the other defendants in the car.

The Court: I refuse to charge as requested, except as I have already charged.

Mr. Ryan: Exception."

The trial court's refusal to charge as was requested, for all defendants, is in itself a denial of due process and again when Section 1898-A was delivered to the jury (p. 158, f. 473):

"Mr. Ryan: I take exception to your Honor's charge of the Section known as 1898-A."

Coffin v. United States, 156 U. S. 432.

Counsel also took exception to the court's denial to set the verdict aside on the ground that "there was an invasion of the constitutional rights of these defendants, in that they did not receive a trial under the due process of law section of the Constitution * * *that when these men took the stand in this court they had to prove their innocence" (pp. 165-166, ff. 495-498).

It cannot be sincerely urged that Section 1898-A was not the controlling factor in guiding the jury in its verdict of guilty (pp. 158-159, ff. 470-479). The presumption of Section 1898-A was the basis for the jury's verdict (Bailey v. Alabama, 219 U. S. 219).

The respondent further contends in his brief herein on page 3, that the crime embodied in the indictment emanates from Section 1897, Subd. 4. The indictment specifies no particular statute upon which it was founded. However,

petitioner respectfully directs this Court's attention to the opinion rendered by Justice Hinkley in Fry v. Hunt, 29 N. Y. S. (2nd) 927, and which is annexed as Exhibit "B" to the Record on Appeal herein (R., pp. 13-15). There the same query arose as evidenced by the court's statement (R., p. 13). There is no question but that Section 1897, Subd. 4 was also used in the Fry case *(supra)*. This fact is made indisputable by Justice Hinkley's reference to the former conviction (R., p. 15, f. 44), and it is only under Section 1897, Subd. 4 that proof of such conviction is required to increase the degree of the offense from a misdemeanor to a felony. Section 1898-A of the Penal Law was passed by the New York Legislature under the guise of a procedural presumption. Section 1897, Subd. 4 defines the crime and is subservient to Section 1898-A which presumes it.

The respondent would remove the foundation which had been laid by Section 1898-A and upon which the indictment is built, and leave the indictment, comprehending Section 1897, Subd. 4, standing undermined and without support in fact.

If the presumption did not attach to the occupants in the car in the first instance, then the Grand Jury could not have found the indictment accusing four persons, as here, of possessing two pistols.

It is too plain to be argued that nothing less than actual or constructive possession must be established under Section 1897, Subd. 4. Possession under this section must be proven without the aid of the presumption. And if possession were proven, as inferred by the respondent, then why was Section 1898-A invoked to presume it?

POINT TWO.

Section 1898-A of the Penal Law of New York is not a valid enactment of a rule of evidence. It was invoked against petitioner under the guise of a procedural presumption in direct contravention, violation of and repugnance to the Fourteenth Amendment of the Constitution of the United States.

Petitioner is in accord with the respondent that the State has the power to prescribe the evidence which is to be received in the courts of its own government (Respondent's Brief, p. 5).

However, this power has its constitutional limitations. The guarantee of due process of law under the Fourteenth Amendment of the National Constitution demands only that the means used shall have a real, fair and natural relation to the ultimate fact sought to be established.

Under Section 1898-A, Penal Law there is no rational connection between the fact proved (guns) and the fact presumed (possession).

The State cannot subvert that fundamental rule of justice which holds that the defendant shall be presumed to be innocent until he is proven guilty beyond a reasonable doubt.

Section 1898-A presumes possession to all occupants. If the word "guilty" be substituted for "possession" the same effect would be realized. Possession is a crime under Section 1897, Subd. 4. Under the common law, the legal presumption would be directly the reverse of that declared by Section 1898-A. Either the legal presumption of innocence is a nullity or Section 1898-A is unconstitutional.

Under the permitted presumptions, if the defendant allowed any of them to go unrebutted, the People would still have to prove the defendant guilty beyond a reasonable doubt.

However, under Section 1898-A, the presumption unrebutted is fatal. When the defendant takes the stand to rebut this presumption he actually is compelled to prove himself innocent. And, in attempting to prove himself innocent, he is compelled to take the witness stand to deny knowledge of the condemned weapons. Regardless to what degree this presumption is repelled, it still stays with the defendant from the beginning until the end of the trial.

On page 5 of his brief, respondent undertakes to show this Court what supposedly are presumptions akin to the presumption under attack:

People v. Adams, 176 N. Y. 35; aff'd 192 U. S. 585.
People v. Cannon, 139 N. Y. 32.
People v. Persce, 205 N. Y. 397.

The above cases all contain presumptions which arise from *actual or constructive possession* of the condemned thing. They serve to strengthen petitioner's claim in his original brief. Petitioner is not quarrelling with a presumption that comes from possession and runs into knowledge.

Under Section 1898-A not only does actual and constructive possession go unproved, but *conscious* possession is simply presumed. Yet, the respondent says that the presumption "merely shifts the burden of proof and calls upon a defendant to explain facts and circumstances peculiarly within his knowledge" (B., p. 7).

It is also alleged by the respondent, on page 7, that petitioner was not convicted solely on the presumption created by Section 1898-A. The fact remains that the presumption was invoked instead of the presumption of innocence and its totality of effect convinced the jury to convict.

Bailey v. Alabama, *supra.*

True, the police found two cartridges on the person of the petitioner. But, if factual evidence is to be drawn herein, then there was no evidence which would show that those cartridges actually belonged to either one of the two revolvers found in the automobile. The revolvers were not visible, and there was not the evidence to warrant the jury in concluding beyond a reasonable doubt that the petitioner had illegal possession or guilty knowledge thereof.

Petitioner testified that he found the cartridges in a compartment on the dashboard, immediately brought them to the attention of Klein (who owned, operated and had exclusive dominion and control of the automobile) at the time the police ordered him to pull over to the curb (Cri. Record on Appeal, p. 105, f. 315).

Klein had made no effort to refute the petitioner's claim.

If the statements made by petitioner were untrue, then they could have been unsubstantiated by proper proof. It was instinctively natural for Klein to interpose a defense, which he had not done, but instead corroborated the petitioner's testimony by admitting that before the car was intercepted by the police your petitioner had shown him the cartridges (Cri. Record on Appeal, p. 83, f. 249). Klein, moreover, was acquitted.

At any rate, aside from the presumption of guilt which Section 1898-A contains, your petitioner was presumed to be innocent until his guilt was established by evidence sufficient to convince a jury beyond a reasonable doubt of his guilt.

The presumption of innocence has been tested in the crucible of time since the inception of jury trials. Section 1898-A was created by the state legislature several years ago. The public became aware that it was left open to misdirected prosecution and conviction and criticized the statute in unsparing terms as the "gun-in-auto-guilt" law. The public's pulse was registered in 1939 when the New York State Legislature unanimously voted to repeal Section 1898-A, but the Governor who had sponsored the law refused to sign it out of the books.

The claim, in respondent's brief on page 8, that the confusion which exists in the State Courts has been eliminated by the decision of the Court of Appeals of the State of New York in the present cause (Peo. *ex rel.* Rogalski v. Martin, 290 N. Y. (Mem.) 207; Advance Sheet No. 220, dated July 17, 1943), is without merit.

The recent decision of the Court of Appeals does not dispel the confusion that exists; if anything, it adds to the confusion.

Save for a *Per Curiam* opinion rendered by the Appellate Division (R., pp. 25-26), no court has rendered an opinion defending the constitutionality of Section 1898-A, Penal Law, in either the criminal proceeding (People v. Rogalski, *supra)*, or the civil proceeding herein (Peo. *ex rel.* Rogalski v. Martin, *supra)*.

This conception by respondent lacks cogency. It does not conform with the Fry case *(supra)*. Justice Hinkley in that case had made extensive research, as evidenced by the collection of authorities on the statute, and manifestly signified that he did not recognize the "no-opinion" decisions rendered in the Rogalski case on the criminal appeal.

It certainly exhibits a state of confusion since the law is applied so capriciously. The Fry case had come after petitioner's prior appeal, and Fry won his discharge, but petitioner is still imprisoned. The courts in the State of New York are not in accord as to the constitutionality of Section 1898-A, and this Court should settle the question. The central difference of liberty and imprisonment under this statute is still a matter of geography within the boundaries of the State.

CONCLUSION.

This case is up before this Court on the authority of Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, and petitioner respectfully asks this Honorable Court to take judicial notice thereof, and prays that the Writ of Certiorari be granted.

Respectfully submitted,

STEPHEN ROGALSKI,
Petitioner in Pro. Per.,
Box B, Dannemora, N. Y.

(21)

IN THE

Supreme Court of the United States

October Term, 1943.

No. 187

THE PEOPLE OF THE STATE OF NEW YORK, on the relation of STEPHEN ROGALSKI,

Petitioner,

against

WALTER B. MARTIN, as Warden of Clinton Prison at Dannemora, New York,

Respondent.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

NATHANIEL L. GOLDSTEIN,
Attorney-General of the State of New York,
Attorney for Respondent,
The Capitol,
Albany, New York.

ORRIN G. JUDD,
Solicitor General,
Solicitor for Respondent.

WENDELL P. BROWN,
First Assistant Attorney-General,

EDWARD L. RYAN,
Assistant Attorney-General,
Of Counsel.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

Cases Cited.

Constitutional Provisions and Statutes.

IN THE

Supreme Court of the United States

October Term, 1943.

No. .....

THE PEOPLE OF THE STATE OF NEW YORK, on the relation of STEPHEN ROGALSKI,

Petitioner,

against

WALTER B. MARTIN, as Warden of Clinton Prison at Dannemora, New York,

Respondent.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

Now comes the respondent in the above entitled cause, by his counsel of record, and supplements his brief in opposition to the petition herein.

ARGUMENT.

POINT ONE.

The dismissal of the writ of habeas corpus by the Courts of New York State did not operate to deprive petitioner of his rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

In his reply brief (p. 2), petitioner has asked leave of this Court to refer to the Record on Appeal in the criminal

action in which the judgment of conviction was rendered against him *(People v. Rogalski,* 256 App. Div. (N. Y.) 995, aff'd, 281 N. Y. 581) and urges, at page 3, that there was a denial of due process in the Trial Court's refusal to charge as requested and in its denial of the motion to set the verdict aside. We direct this supplemental brief to that question.

At the close of the People's case, defendant's counsel moved for a dismissal of the indictment, urging the unconstitutionality of Section 1898-a of the Penal Law of New York (R., fols. 184-187)* and, on the same ground, moved to set aside the verdict (R., fols. 495-498). On his appeals from the judgment of conviction to the Appellate Division of the Supreme Court of New York and to the Court of Appeals of New York (Br., pp. 5-9) he raised and argued the same question.

Both Courts affirmed the judgment of conviction, thereby determining all questions presented on the appeals. Petitioner did not avail himself of the opportunity to apply to this Court for a review of any federal question.

It has been well settled by this Court that *habeas corpus* calls in question only the jurisdiction of the court whose judgment is challenged.

Knewel v. Egan, 268 U. S. 442, 445 and cases cited.

This, too, is the rule followed by the courts of New York.

People ex rel. Hubert v. Kaiser, 206 N. Y. 46, 53.

Petitioner does not raise the question of jurisdiction of the trial court over his person or the crime charged.

Having failed to pursue by appeal to this Court his remedy in the criminal action, petitioner, by this proceeding,

* All page and folio references are to the Record on Appeal and the defendant-appellant Rogalski's brief in the Court of Appeals of New York in the criminal action.

seeks to review again the evidence adduced on his trial and the trial court's rulings thereon. This Court has held that *habeas corpus* cannot be so invoked.

In *Riddle v. Dyche,* 262 U. S. 333, the Court, at page 335, said:

> "That the trial court had jurisdiction to try and punish the appellant for the offense with which he was charged is not disputed. The attempt is collaterally to impeach the record, showing upon its face that a lawful jury was duly empaneled, sworn and charged. Appellant's remedy, as suggested in the mandamus proceeding, was by writ of error. He did not avail himself of it and whatever may have been the cause or excuse for not doing so, *habeas corpus* cannot be used as a substitute."

Again, in *Woolsey v. Best,* 299 U. S. 1, this Court, *per curiam,* stated:

> "It is well established that the writ of *habeas corpus* cannot be used as a writ of error. This is the rule in Colorado as well as in this Court. The judgment of conviction was not subject to collateral attack. [Cases cited.] It is apparent from the record submitted that the state court had jurisdiction to try the appellant for violation of the statute in question and that any federal question properly raised as to the validity of the statute could have been heard and determined on appeal to this Court from the final judgment in that action. The Supreme Court of the State was not required by the Federal Constitution to entertain such questions on the subsequent petition for *habeas corpus,* and it does not appear that its denial of the petition did not rest upon an adequate non-federal ground."

To the same effect is the holding in *Knewel v. Egan, supra,* at page 445:

> "A person convicted of crime by a judgment of a state court may secure the review of that judgment by the highest state court and if unsuccessful there may then resort to this Court by writ of error if an appropriate federal question be involved and decided

against him; or, if he be imprisoned under the judgment, he may proceed by writ of *habeas corpus* on constitutional grounds summarily to determine whether he is restrained of his liberty by judgment of a court acting without jurisdiction. See *Ex parte Royall,* 117 U. S. 241. But if he pursues the latter remedy, he may not use it as a substitute for a writ of error. *Ex parte Parks,* 93 U. S. 18; *In re Coy,* 127 U. S. 731."

On this point also, the courts of New York are in accord with the holding of this Court.

People ex rel. Holt v. Lambert, 237 App. Div. (N. Y.) 39, aff'd, without opinion, 262 N. Y. 511.

CONCLUSION.

We respectfully submit the judgment of conviction was rendered, and was sustained on appeal, by due process of law, and urge anew that this cause presents no question sufficiently substantial to warrant review by this Court and that the petition be denied.

Dated: September 13, 1943.

NATHANIEL L. GOLDSTEIN,
Attorney-General of the State of New York,
Attorney for Respondent,
The Capitol,
Albany, New York.

ORRIN G. JUDD,
Solicitor General,
Solicitor for Respondent,
WENDELL P. BROWN,
First Assistant Attorney-General,
EDWARD L. RYAN,
Assistant Attorney-General,
Of Counsel.